IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-222

JOSEPH CHRISTOVAO, d/b/a MERCANTUM TRADING COMPANY,

Petitioner,

against

UNISUL-UNIAO DE COOP. TRANSF. DE TOMATE DO SUL DO TEJO, S.C.R.L.; COOPERATIVA TRANSFORMADORA DOS PRODUCTOS AGRICOLAS DO VALE DO SORRAIA, S.C.R.L.; COOPERATIVA AGRICOLA DO VALE DO SADO, S.C.R.L.; COOPERATIVA HORTO-FRUTICOLA DO ROXO, S.C.R.L.; COOPERATIVA AGRICOLA DO MIRA, S.C.R.L.,

Respondents,

and

ATTORNEY GENERAL OF THE STATE OF NEW YORK,

Intervenor.

ON PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE DIVISION OF THE SUPREME COURT OF THE STATE OF NEW YORK, FIRST JUDICIAL DEPARTMENT

BRIEF FOR INTERVENOR IN OPPOSITION

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Intervenor opposes the petition for a writ of certiorari to review an order of the Appellate Division of the Supreme Court of the State of New York, First Judicial Department, dated December 21, 1976, which affirmed the order of the Supreme Court of the State of New York,

New York County, entered on August 4, 1976, which dismissed the complaint due to lack of personal jurisdiction over the defendants and, with respect to jurisdiction obtained under an order of attachment, because the forum was not convenient.

Opinions Below

The opinion of the Supreme Court of the State of New York is unreported and is annexed to the petition (Appendix A, pp. 1a-4a). The opinion of the Appellate Division of the Supreme Court of the State of New York, First Judicial Department is reported at 55 A D 2d 561 and is annexed to the petition (Appendix A, pp. 5a-11a). The opinion of the New York Court of Appeals dismissing petitioner's appeal as of right to that court is reported at 41 N Y 2d 338 and is annexed to the petition (Appendix A, pp. 11a-13a). Permission to appeal to the Court of Appeals subsequently was denied by the Appellate Division on April 12, 1977 and by the Court of Appeals on July 5, 1977. Those orders are as yet unreported and are annexed to the petitioner's appendix at pages 22a and 24a, respectively.

Jurisdiction

The order of the Court of Appeals denying leave to appeal is dated July 5, 1977. Petitioner purports to invoke the jurisdiction of this Court pursuant to 28 U.S.C. § 1257 (3).

Question Presented

Is petitioner's challenge to the New York *forum non conveniens* statute insubstantial and foreclosed by prior decisions of this Court, by the trial court's findings of fact and by petitioner's failure to raise the issue properly in State court?

Statement

The Statement of the facts described in pages 4-8 of the brief of the respondents in opposition is deemed adequate. The Court is respectfully referred to that statement.

Relevant Statute

"When the court finds that in the interest of substantial justice the action should be heard in another forum, the court, on the motion of any party, may stay or dismiss the action in whole or in part on any conditions that may be just. The domicile or residence in the State of any party to the action shall not preclude the court from staying or dismissing the action." New York Civil Practice Law and Rules 327.

Reasons for Denying the Petition for Certiorari

Petitioner's Challenge to the New York *Forum Non Conveniens* Statute Is Insubstantial and Is Foreclosed by Prior Decisions of This Court, by the Trial Court's Findings of Fact and by Petitioner's Failure to Raise the Issue Properly in State Court.

As stated in *Gulf Oil Corp.* v. *Gilbert,* 330 U.S. 501 (1947):

> "This Court, in one form of words or another, has repeatedly recognized the existence of the power to decline jurisdiction in exceptional circumstances"
>
> • • •
>
> "We later expressly said that a state court 'may in appropriate cases apply the doctrine of *forum non conveniens.*' *Broderick* v. *Rosner,* 294 U.S. 629, 643; *Williams* v. *North Carolina,* 317 U.S. 287, 294 n. 5." 330 U.S. at 504.

Although in the application of its *forum non conveniens* statute a state may not discriminate against a particular kind of suit or discriminate against citizens of other states, it may deny access to its courts for reasons of local policy and its "acceptance or rejection of the doctrine of *forum non conveniens* [is] a question of state law not open to review here." *Missouri ex rel. Southern Ry. Co.* v. *Mayfield,* 340 U.S. 1 (1950).

The doctrine of *forum non conveniens* has often been employed by federal courts to dismiss an action where the other available forum is that of a foreign country. See, *Fitzgerald* v. *Texaco, Inc.,* 521 F 2d 448 (2d Cir. 1975) cert. den. 423 U.S. 1052 (1976); *Yerostathus* v. *A. Luisi, Ltd.,* 380 F 2d 377 (9th Cir. 1967); *Vanity Fair Mills* v. *T. Eaton Co.,* 234 F. 2d 633 (2d Cir.) cert. den. 352 U.S. 871 (1950). ("An American citizen does not have an absolute right under all circumstances to sue in an American Court." 234 F 2d at 645-46); *Harrison* v. *Capivary, Inc.,* 334 F 2d 1141 (E.D. Mo. 1971). New York CPLR 327 is New York's codification of its doctrine of *forum non conveniens* and presents no novel or undecided constitutional issue.

Where no fundamental interest is involved, this court has held that an individual does not have a right to unfettered access to the courts notwithstanding the court's jurisdiction of the subject and the parties. See *United* v. *Kras,* 409 U.S. 434 (1973). *Ortwein* v. *Schwab,* 410 U.S. 656 (1973).*

Petitioner has no more right to access to New York's courts than did Kras to the bankruptcy court or the

* In contrasting Kras' position with that of the plaintiff in *Boddie* v. *Connecticut,* 401 U.S. 371 (1971) cited by petitioner, the Court noted that the "[g]overnment's role with respect to the private commercial relationship is qualitatively and quantitatively different from its role in the establishment, enforcement, and dissolution of the marriage." 409 U.S. at 445-46.

welfare recipient Ortwein to the Oregon appellate court. Petitioner, in fact, does have a forum to which the trial count found he had access.**

Although "appropriately defined and uniformly applied bona fide residence requirements" *Dunn* v. *Blumstein,* 405 U.S. 330, 342, n. 13 (1972), are permissible, petitioner cites no authority granting a resident a constitutional right to access to the courts of his state of residence. See *Ortwein* v. *Schwab, supra; United States* v. *Kras, supra, Sosna* v. *Iowa,* 419 U.S. 393 (1975).

New York's *forum non conveniens* statute is the same proper exercise of its States' function that has been previously upheld by this court. Review of that issue is foreclosed by those prior decisions, and the petition should be denied. See *Palmer Oil Corp.* v. *Amerada Corp.,* 343 U.S. 390 (1952); *Zucht* v. *King,* 260 U.S. 174 (1922).

Petitioner's real complaint is with the trial court's finding that the petitioner could receive a fair trial in Portugal and that the nexus of events at issue would be more conveniently tried in Portugal for myriad reasons. (See decision of the court, petitioner's appendix 2a-4a). This finding was upheld by all of the Appellate Division judges. Insofar as petitioner requests this court to review the application of CPLR 327 to him, he requests the court to review a factual determination of a State court, a request that generally will not support a petition for certiorari, see *Fry Roofing Co.* v. *Wood,* 344 U.S. 157 (1952); *Grayson* v. *Harris,* 267 U.S. 352 (1952); *Portland R. Co.* v. *Railroad Commission,* 229 U.S. 397 (1913).

Apart from the foregoing, the full record demonstrates that petitioner did not present the constitutional claim alleged here in the trial court. Under New York Law, the

** The trial court conditioned its dismissal on respondents' acceptance of service of process in Portugal, appearance in that court and waiver of any statute of limitations defense.

issue was thus waived. See *Shapira* v. *United Medical Service, Inc.*, 15 N Y 2d 200 (1965); *Flagg* v. *Nichols*, 307 N Y 96 (1954); *Bankers Trust Co.* v. *Martin*, 51 A D 2d 411, 381 N Y S 2d 1001, 1004 (1976) (3rd Dept. 1976), and has been held to preclude review by this Court. *Bailey* v. *Anderson*, 326 U.S. 203 (1945); *Hulbert* v. *Chicago*, 202 U.S. 275 (1906).

CONCLUSION

The petition for a writ of certiorari should be denied.

Dated: New York, New York
September 29, 1977

Respectfully submitted,

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